

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KENNETH GREGORY WILSON, as Personal  
Representative of the Estate of ORPHA ANNE  
WILSON, Deceased, and as Personal  
Representative of the Estate of HUGHIE W.  
WILSON, JR., Deceased,

Plaintiff-Appellant,

v

THOMAS B. RICHARDSON,

Defendant-Appellee.

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UNPUBLISHED  
January 12, 2001

No. 216661  
Wayne Circuit Court  
LC No. 98-827506-NM

Before: Gribbs, P.J., and Kelly and Sawyer, JJ.

PER CURIAM.

Plaintiff Kenneth Gregory Wilson appeals as of right from an order of the circuit court granting summary disposition in favor of defendant Thomas B. Richardson. We affirm.

This legal malpractice case arises from the voluntary dismissal of a medical malpractice lawsuit by defendant. Defendant, an attorney, represented plaintiff in a medical malpractice lawsuit against Sinai Hospital and Dr. Waldemar Wajszczuk. Orpha Wilson, plaintiff's mother, was brought to Sinai Hospital with chest pains. A heart catheterization procedure was performed by Dr. Wajszczuk on Orpha Wilson and she died during this procedure. Plaintiff and his family were informed that Orpha Wilson died of a heart attack.

Plaintiff retained Dr. Ronald D. Frazier to review Orpha Wilson's medical records and diagnostic film from the procedure. Dr. Frazier concluded that Orpha Wilson's aorta had been severed during the procedure and this caused her death. Plaintiff then retained defendant to represent him in a medical malpractice suit against Sinai Hospital and Dr. Wajszczuk.

During the course of the medical malpractice suit, defendants Sinai Hospital and Dr. Wajszczuk retained Dr. John Bittl to review Orpha Wilson's medical records and diagnostic film. Dr. Bittl concluded that there was no evidence of aortic dissection. Thus, the trial court recommended the exhumation and autopsy of Orpha Wilson's body.

Dr. Werner U. Spitz was retained by plaintiff to conduct the autopsy. The autopsy was also observed by Dr. L.J. Dragovic at the request of defendants Sinai Hospital and Dr. Wajszczuk. Dr. Spitz and Dr. Dragovic both concluded that Orpha Wilson's aorta had not been severed. Hence, defendant voluntarily dismissed the medical malpractice lawsuit, with prejudice, against defendants Sinai Hospital and Dr. Wajszczuk.

Plaintiff filed the instant legal malpractice suit against defendant claiming that the dismissal of the medical malpractice lawsuit was without his consent. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Essentially, defendant argued that plaintiff would not be able to prevail on a legal malpractice claim because plaintiff could not establish that but for defendant's dismissal plaintiff would have been successful on the medical malpractice claim. The trial court agreed with defendant and granted the motion for summary disposition.

Plaintiff first argues that the trial court erred when it granted summary disposition because there were genuine issues of material fact. We note that the trial court granted summary disposition pursuant to MCR 2.116(C)(10). Thus, we will review the motion for summary disposition de novo and determine whether the evidence presented fails to establish a genuine issue of material fact entitling the movant to judgment as a matter of law. *Arias v Talon Development Group, Inc.*, 239 Mich App 265, 266; 608 NW2d 484 (2000). We will consider the "pleadings, affidavits, depositions, admissions and other documentary evidence available to it" when making this determination. *Weakley v Dearborn Heights*, 240 Mich App 382, 384; 612 NW2d 428 (2000).

MCR 2.116(C)(10) provides that summary disposition may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

"To determine if a genuine issue of material fact exists, the test is 'whether the kind of record which might be developed, giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds could differ.'" [*Shallal v Catholic Social Services*, 455 Mich 604, 609; 566 NW2d 571 (1997), quoting *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994), quoting *Farm Bureau Mutual Ins Co v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991), rev'd on other grounds 437 Mich 175 (1991).]

Thus, we must determine whether plaintiff presented enough evidence supporting his legal malpractice claim to survive a motion for summary disposition.

In order to establish a claim for legal malpractice, the plaintiff has the burden of establishing the following elements: (1) the existence of an attorney-client relationship (the duty); (2) negligence in the legal representation of the plaintiff (the breach); (3) that the negligence was a proximate cause of an injury (causation); and (4) the fact and extent of the injury alleged (damage). [*Barrow v Pritchard*, 235 Mich App 478, 484; 597 NW2d 853 (1999).]

Here, a duty was established because plaintiff and defendant agree that there was an attorney-client relationship. However, plaintiff and defendant disagree about whether there was a breach of that duty. Plaintiff submitted an affidavit attesting that defendant did not get plaintiff's permission to voluntarily dismiss the medical malpractice case. Defendant, however, in his motion for summary disposition stated that defendant had plaintiff's permission to voluntarily dismiss the medical malpractice case. Thus, an issue of fact existed.

The trial court recognized this dispute and stated, when granting the motion for summary disposition, that it believed defendant when he stated that he kept plaintiff apprised of the status of the lawsuit "at every level" of the proceedings. We find this statement by the trial court indicative of the fact that the trial court made a credibility determination, which is entirely impermissible when ruling on a motion for summary disposition. *Morris v Allstate Ins Co*, 230 Mich App 361, 364; 584 NW2d 340 (1998).

Nonetheless, we do not find that the trial court erred when it granted summary disposition. Plaintiff cannot establish that defendant's negligence was the proximate cause of his injury.<sup>1</sup> In other words, plaintiff cannot establish that "but for the attorney's alleged malpractice, he would have been successful in the underlying suit." *Colbert v Coneybeare Law Office*, 239 Mich App 608, 619; 609 NW2d 208 (2000), quoting *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994).

More specifically, even if defendant dismissed the lawsuit without permission, plaintiff cannot establish that he would have been successful in the medical malpractice lawsuit if defendant had not dismissed the lawsuit. Plaintiff points to the report of Dr. Frazier, a cardiologist, as support for his contention that he would have been successful in the medical malpractice lawsuit. Dr. Frazier reviewed Orpha's medical records and diagnostic film and concluded that Orpha's aorta had been dissected during the procedure. However, as defendant explains, Dr. Spitz and Dr. Dragovic, after conducting an autopsy of Orpha's body, concluded that there was no aortic dissection. Additionally, Dr. John Bittl, a cardiologist, reviewed the same documentation as Dr. Frazier and concluded that there was no evidence of aortic dissection.

Plaintiff argues that, at a minimum, he has established enough evidence to survive a motion for summary disposition because the report of Dr. Frazier found an aortic dissection. However, we find plaintiff's claim unreasonable. The autopsy simply foreclosed the medical malpractice claim, which was based entirely on aortic dissection. It is unlikely that a reasonable mind would find Dr. Frazier's findings persuasive, particularly when the findings of Dr. Spitz and Dr. Dragovic directly contradicted Dr. Frazier's findings, which were based entirely on a review of medical records and diagnostic film as opposed to actually viewing Orpha's body and aorta. Moreover, the likelihood that a reasonable mind would find Dr. Frazier's findings

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<sup>1</sup> We note that although a question of fact exists with regard to the breach of duty element of the legal malpractice claim, summary disposition is still appropriate because there is no genuine issue of material fact with regard to the causation element of the legal malpractice claim. Indeed, plaintiff is required to prove all elements of his claim to prevail. See *Adas v Ames Color-File*, 160 Mich App 297, 300; 407 NW2d 640 (1987).

persuasive is further diminished, given the fact that Dr. Bittl reviewed the same medical records and diagnostic film and found no aortic dissection.

Thus, although we agree that there is certainly a question concerning whether defendant voluntarily dismissed the medical malpractice lawsuit without plaintiff's consent, summary disposition was proper because, regardless of how that question is answered, plaintiff cannot establish that he would have been successful in the medical malpractice case.

Finally, plaintiff argues that summary disposition was improperly granted because discovery had not been completed. We recognize that "[s]ummary disposition is premature if granted before discovery on a disputed issue is complete. However, summary disposition is not premature if the discovery does not stand a fair chance of uncovering factual support for opposing the motion for summary disposition." *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996).

Again, we disagree with plaintiff that further discovery would have produced information to support the medical malpractice claim. As previously stated, the autopsy foreclosed the possibility of a successful medical malpractice claim premised entirely on aortic dissection. Any further discovery would have proved futile. Thus, summary disposition was proper.

Affirmed.

/s/ Roman S. Gribbs

/s/ David H. Sawyer